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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of Petition of the SBC Companies For Forbearance from Regulation as a Dominant Carrier for High Capacity Dedicated Transport Services in Specified MSAs

98-227

PETITION OF THE SBC COMPANIES FOR FORBEARANCE

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EXECUTIVE SUMMARY

The market for high capacity dedicated transport services has become highly competitive in at least 14 different metropolitan statistical areas ("MSAs") in which one of SBC's telephone operating companies is the incumbent local exchange carrier. The 14 MSAs identified in this petition account for 70% of the SBC telephone companies' high capacity dedicated transport circuits. SBC's telephone operating companies face intense facilities-based competition in each of these geographical markets from numerous competitors, including AT&T and MCI WorldCom. Their market shares have been reduced in these MSAs by a low of 25% to more than 50%. Consumers of these high capacity dedicated transport services are typically sophisticated business end users and interexchange carriers, and they have demonstrated that they are fully capable of purchasing services from suppliers other than the incumbent LEC. These alternative suppliers have extensive regional networks that are fully capable of providing such services, and they have substantial excess capacity to respond to consumer demand. Indeed, customers can choose from among as many as three suppliers other than the incumbent SBC telephone company in 9 of the 14 MSAs identified in this petition. When compared to such giant competitors such as AT&T, MCI WorldCom, and Time Warner, the cost structure, size, and resources of the SBC telephone companies confer on them no unfair advantages.

Because the SBC telephone companies do not have market power in the high capacity dedicated transport services market in any of the 14 MSAs identified in this petition, the Commission should forbear from regulating them as if they were still dominant carriers. Specifically, the SBC telephone companies are requesting that the Commission forbear from enforcing any of its access charge rules that it does not also enforce on their competitors (e.g., Part 61 and Part 69).

Like their competitors, the SBC telephone companies should be allowed to file tariffs on one day's notice, and the tariffs should be presumed lawful. Like their competitors, the SBC telephone companies should be allowed to set prices that reflect market conditions in a particular geographical area, rather than having to set average prices. Like their competitors, the SBC telephone companies should be allowed to offer contract-based pricing in order to respond to the needs of particular customers. Like their competitors, the SBC telephone companies should be allowed to offer volume and term discounts, as well as promotional pricing options. Until the playing field is level, consumers will not enjoy the benefits of truly competitive prices.

The Commission is required to forbear when it determines that (1) enforcement is not necessary to ensure that charges, practices, and classifications are just and reasonable and not unjustly or unreasonably discriminatory; (2) enforcement is not necessary for the protection of consumers; and (3) forbearance is consistent with the public interest. The evidence provided in this petition clearly demonstrates that forbearance is required.

The Commission's access charge rules that apply only to SBC's telephone companies and not to their competitors in the provision of high capacity dedicated transport services are not necessary either to ensure just and reasonable rates or to protect consumers. The existence of numerous competitors, the incumbent's declining market share, and high demand and supply elasticities will ensure that SBC's telephone companies are incapable of profiting from any effort to charge supracompetive prices. Furthermore, the Commission's complaint procedures will remain in place to ensure that any unjust or unreasonable rates can be modified.

Forbearance will accelerate competition in these 14 MSAs for the provision of high capacity dedicated transport services. If the SBC companies are permitted to exercise the same flexibility that all of their competitors enjoy, the market prices will quickly reflect the costs of the most efficient producers. Forbearance clearly serves the public interest.

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PETITION OF THE SBC COMPANIES FOR FORBEARANCE

Pursuant to section 10 of the Communications Act of 1934, as amended (the "Act"), 47 U.S.C. § 160, SBC Communications Inc. ("SBC"), on behalf of Pacific Bell, Nevada Bell, and Southwestern Bell Telephone Company (collectively, the "SBC Companies"),[1] respectfully requests that the Federal Communications Commission exercise its authority to forbear from regulating the SBC Companies as dominant carriers with respect to high capacity dedicated transport services[2] in those portions of specified Metropolitan Statistical Areas ("MSAs") in which the SBC Companies operate as the incumbent local exchange carriers. Specifically, with respect to the following geographical areas, the SBC Companies seek relief from enforcement of

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[1] Even though The Southern New England Telephone Company ("SNET") is now a wholly owned subsidiary of SBC, SBC is not requesting any forbearance relief on behalf of SNET at this time.

[2] High capacity dedicated transport services are those special access services, switched access entrance facilities, and switched access direct trunked transport services that operate at DS1 and higher transmission speeds (e.g., DS1, DS3, OCN). High capacity dedicated transport services do not include switched access or special access dedicated transport at transmission levels of DS0 and below.

any Commission rules affecting high capacity dedicated transport services that apply to the SBC Companies but not to their competitors:[3] (1) Little Rock, AR; (2) Los Angeles, CA (including Orange County and Riverside); (3) Sacramento, CA; (4) San Diego, CA; (5) San Francisco, CA; (6) San Jose, CA; (7) St. Louis, MO; (8) Reno, NV; (9) Oklahoma City, OK; (10) Austin, TX; (11) Dallas/Ft. Worth, TX; (12) El Paso, TX; (13) Houston, TX; and (14) San Antonio, TX.[4]

I. INTRODUCTION

There have been significant and demonstrable changes in the competitive landscape since the implementation of price-cap regulation for local exchange carriers in 1990, yet the Commission's rules have not kept up with these market transformations. Services in the trunking basket are widely acknowledged to face substantial competition.[5] For example, the Commission's July 1998 report on Trends in Telephone Service states that the number of ILEC

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[3] If, prior to reaching a decision on this petition, the Commission concludes that high capacity dedicated transport services ought to be excluded altogether from dominant-carrier regulation (see CC Docket Nos. 94-1, 96-262, and 98-177), this petition would likely become moot. In any case, this petition should in no way be construed as a concession or waiver of any position that the SBC Companies may take with respect to these other proceedings.

[4] This petition seeks forbearance from regulation of the high capacity dedicated transport services in each of the 14 MSAs listed. Although the SBC Companies have chosen to file a single forbearance petition covering all 14 of the MSAs listed here, the petition requests forbearance with respect to each MSA individually. In other words, while the SBC Companies believe that forbearance is appropriate with respect to all the listed MSAs, the petition should be treated as a request for forbearance with respect to each MSA separately.

[5] Richard Schmalansee & William Taylor, The Need for Carrier Access Pricing Flexibility in Light of Recent Marketplace Developments: A Primer at 20 (Jan. 1998) (submitted as part of an ex parte presentation in CC Docket No. 96-262 by the United States Telephone Association, Jan. 16, 1998) (indicating that, by the first quarter of 1995, Pacific Bell had already lost 37% of the San Francisco market for dedicated transport services).

central offices with one or more collocation arrangements has almost doubled in the SBC Companies' territory from 51 in 1995 to 114 in 1997.[6]

More than a year-and-a-half has elapsed since the Access Charge Reform Order[7] was issued. Competition has increased dramatically, yet the Commission continues to impose rules that limit the flexibility of the SBC Companies to respond in a meaningful way to this substantial competition for high capacity dedicated transport services.

Market forces, not regulation, can and should determine the prices for high capacity dedicated transport services. The record developed in the Access Charge Reform Order is already out of date, for competition has expanded enormously, particularly in the 14 MSAs discussed in this petition. Given the current level of competition for high capacity dedicated transport services, regulation of these services is no longer necessary to ensure that the rates and practices of the SBC Companies are just, reasonable, and nondiscriminatory; or to protect consumers or the public interest. 47 U.S.C. § 160(a). This petition for forbearance should be granted so that the SBC Companies may compete on a level playing field with their competitors and thereby ensure that consumers may fully benefit from competition for the provision of high capacity dedicated transport services.

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[6] Industry Analysis Division, Common Carrier Bureau, Federal Communications Commission, Trends in Telephone Service 33, table 8.2 (July 1998).

[7] Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Transport Rate Structure and Pricing; End User Common Line Charges, First Report and Order, 12 FCC Rcd 15982 (1997) ("Access Charge Reform Order"), petitions for review denied, Southwestern Bell Tel. Co. v. FCC, 153 F.3d 523 (8th Cir. 1998).

II. THE FORBEARANCE STANDARD

A. Section 10

Under section 10 of the Act, the Commission is required to forbear from applying any regulation or provision of the Act to a telecommunications carrier or service, in any of its geographic markets, if the Commission determines that: (1) enforcement is not necessary to ensure that the charges, practices, classifications, or regulations in connection with the telecommunications carrier or service are just and reasonable and not unjustly or unreasonably discriminatory; (2) enforcement is not necessary for the protection of consumers; and (3) forbearance is consistent with the public interest.[8] In making the determination that forbearance is consistent with the public interest, the Commission must consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services.[9]

As the Commission has noted, "section 10 mandates forbearance if the statutory criteria are met."[10] Therefore, the Commission has consistently engaged in a careful analysis of the three statutory criteria set out in the statute.[11] The first criterion requires the Commission to determine

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[8] 47 U.S.C. § 160(a).

[9] Id. § 160(b).

[10] Bell Operating Companies' Petitions for Forbearance from the Application of Section 272 of the Communications Act of 1934, as Amended, to Certain Activities, Memorandum Opinion and Order, 13 FCC Rcd 2627, 2643 [¶ 26] (1998) ("BOC Forbearance Order").

[11] See, e.g., id. at 2644-53 [¶¶ 29-51]; Federal Communications Bar Association's Petition for Forbearance from Section 310(d) and Personal Communications Industry

whether a particular regulation is in fact necessary to ensure that the carrier's charges, practices, or classifications are just, reasonable, and nondiscriminatory. So, for example, where the Commission has determined that mandatory tariff filing requirements for competitive access providers ("CAPs") are "unnecessary" to ensure that rates for interstate access services provided by these carriers are just and reasonable, it has concluded that this criterion has been met.[12] Furthermore, the Commission has determined that tariffing is not necessary for such carriers where the Commission "can address any issue of unlawful rates through the exercise of [its] authority to investigate and adjudicate complaints under Section 208."[13]

The second criterion under section 10 requires the Commission to determine that enforcement of the regulations at issue is not necessary to protect consumers. The Commission has generally taken the position that, if forbearance is justified under the first criterion, it is probably also justified under the second. The Commission has specifically recognized that

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Association's Broadband Personal Communications Services Alliance's Petition for Forbearance for Broadband Personal Communications Services, Memorandum Opinion and Order, 13 FCC Rcd 6293, 6300-05 [¶¶ 10-21] (1998) ("PCIA Forbearance Order").

[12] Complete Detariffing for Competitive Access Providers and Competitive Local Exchange Carriers, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 12 FCC Rcd 8596, 8608 [¶ 23] (1997) ("CAP Forbearance Order"); see also BOC Forbearance Order, 13 FCC Rcd at 2646 [¶ 34] ("[b]ecause application of the section 272 separate affiliate requirement to the BOCs' E911 services would impose substantial costs without increasing the quality of those services," the Commission concluded that it would forbear from applying section 272); id. at 2647 [¶ 36] (concluding that it would forbear from applying section 272 as a means of requiring BOCs to make available to unaffiliated entities the information they use to route E911 calls to the appropriate public service answering points, because the Commission did not believe that "such a condition [was] necessary to ensure that BOC provision of E911 service is just, reasonable, and non-discriminatory, in accordance with section 10(a)").

[13] CAP Forbearance Order, 12 FCC Rcd at 8609 [¶ 25].

forbearance with respect to certain regulations will not harm consumers where the Commission retains the authority to protect their interests under other provisions of the Act.[14] So, for example, the Commission has concluded that enforcement of the refund tariffing provision of section 203(c) is not necessary to protect consumers because carriers remain subject to the general requirement under sections 201 through 205 that rates be reasonable and nondiscriminatory, and to the complaint procedures of section 208.[15]

Finally, the third criterion requires that forbearance be consistent with the public interest. Although the Commission "shall consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions,"[16] there is no requirement that a petitioner affirmatively show that forbearance "would enhance competition among providers of telecommunications services."[17] Although it is clear that a determination that "forbearance will promote competition among providers of telecommunications services . . . may be the basis for a Commission finding that forbearance is in the public interest,"[18] a determination that forbearance

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[14] PCIA Forbearance Order, 13 FCC Rcd at 6302 [¶ 14].

[15] Petition for Forbearance from Application of the Communications Act of 1934, as Amended, to Previously Authorized Services, Memorandum Opinion and Order, 12 FCC Rcd 8408, 8411-12 [¶¶ 9-10] (1997).

[16] 47 U.S.C. § 160(b).

[17] BOC Forbearance Order, 13 FCC Rcd at 2651 [¶ 47] ("In requiring us to 'consider' this particular public interest factor, Congress clearly did not intend to preclude our consideration of other factors. The public interest is a broad standard, to be exercised consistent with the underlying goals of the Communications Act, as amended by the 1996 Act." (footnote omitted)).

[18] 47 U.S.C. § 160(b).

would promote competition is a "possible, though not a necessary, basis for a finding that forbearance would be consistent with the public interest."[19]

B. Market Power

In analyzing whether forbearance is appropriate under section 10, the Commission has explicitly recognized that the statutory criteria for forbearance are satisfied when the requesting carrier is shown to be non-dominant in the particular market for which regulatory relief is sought.[20] In granting the CAPs' petition to forbear from application of tariff filing requirements for their provision of interstate access services, the Commission concluded that "tariffing is not necessary to assure reasonable rates for carriers that lack market power,"[21] nor is it necessary to protect the CAPs' consumers.[22] Because "it is highly unlikely that . . . carriers that lack market power could successfully charge rates, or impose terms and conditions, for [the relevant] services

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[19] BOC Forbearance Order, 13 FCC Rcd at 2651 [¶ 48] (agreeing with SBC's assertion that, "'[w]ere it otherwise, no petition could ever be granted that, although neutral in competitive effect, would clearly advance the public interest'").

[20] See Policy and Rules Concerning the Interstate, Interechange Marketplace, Second Report and Order, 11 FCC Rcd 20730, 20742 [¶ 21] (1996) ("IXC Forbearance Order") ("tariffs are not necessary to ensure that the rates, practices, and classifications of nondominant interexchange carriers for interstate, domestic, interexchange services are just and reasonable and not unjustly or unreasonably discriminatory"); id. at 20750 [¶ 36] ("tariff filings by nondominant interexchange carriers for interstate, domestic, interexchange services are not necessary to protect consumers"); id. at 20760 [¶ 52] ("not allowing nondominant interexchange carriers to file tariffs for the provision of interstate, domestic, interexchange services is consistent with the public interest" because it "will enhance competition among providers of such services, promote competitive market conditions, and achieve other objectives that are in the public interest").

[21] CAP Forbearance Order, 12 FCC Rcd at 8608 [¶ 23].

[22] Id. at 8609-10 [¶ 26].

that violate Sections 201 and 202 of the Communications Act," the Commission has concluded in another context "that market forces, [its] administration of the Section 208 complaint process, and [its] ability to reimpose tariff filing requirements, if necessary, are sufficient to protect consumers."[23]

The Commission defines a "dominant carrier" as one that has "market power (i.e., power to control prices)."[24] Market power is the ability of a single supplier (or a few suppliers acting in concert) to raise prices above competitive levels. A firm possessing market power can sustain prices above competitive levels, thereby earning supracompetitive profits while diminishing consumer welfare and damaging the competitive process. With competition sufficiently established, however, market power is precluded. Indeed, the absence of market power is a primary characteristic of competitive markets. Whether a firm possesses market power in the relevant product and geographic market depends on a variety of factors, including the number of competitors, market share, the demand elasticity of the firm's customers, the supply elasticity of the market, and the firm's cost structure, size, and resources.[25]

Determining whether a carrier possesses market power requires that the Commission "(1) identify the relevant product and geographic markets for assessing [the carrier's] market power; and (2) determine how to assess whether, within that market, [the carrier] has market

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[23] IXC Forbearance Order, 11 FCC Rcd at 20750 [¶ 36].

[24] 47 C.F.R. § 61.3(o).

[25] Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier, Order, 11 FCC Rcd 3271, 3293 [¶ 38] (1995) ("AT&T Non-Dominant Order").

power."[26] With respect to identifying the scope of the relevant market, the Commission has traditionally considered all services that may be provided by the same facilities to be in the same market.[27] A carrier has market power within the relevant market when it "has the ability to control price with respect to the overall relevant market."[28] And where a carrier has the ability to control prices only "with respect to specific service segments that are either de minimis to the overall . . . market, or are exposed to increasing competition so as not to materially affect the overall market," the Commission has concluded that this does not satisfy the definition of market power.[29]

In concluding that AT&T lacked market power in the interstate, domestic, interexchange market, the Commission was persuaded that, "when the economic costs of regulation exceed the public interest benefits, [it] should reconsider the validity of continuing to impose such regulation on the market."[30] The costs of imposing longer tariff notice requirements, for

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[26] Id. at 3285 [¶ 19].

[27] See id. at 3287 [¶ 23] (because "there is no significant difference between the interexchange facilities used to provide [residential and business] services[,] . . . it is reasonable and appropriate to include all domestic, interstate, interexchange services in the market for evaluating AT&T's dominance") (reference discussion of "supply substitutability" in William M. Landes & Richard A. Posner, Market Power in Antitrust Cases, 94 Harv. L. Rev. 937, 945 (1981)).

[28] Id. at 3287-88 [¶ 25].

[29] Id. [¶ 26].

[30] Id. at 3290 [¶ 32]; see also Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, Second Report and Order, 9 FCC Rcd 1411, 1479 [¶ 177] (1994); Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, Fourth Report and Order, 95

example, inhibits the carrier from quickly introducing new services and from quickly responding to new offerings by its rivals, thereby reducing its incentive to initiate price reductions and other pro-competitive strategies. Furthermore, competitors can use the regulatory process to delay and thwart such strategies. Regulation imposes compliance costs on the carrier and administrative costs on the Commission.[31] For the same reasons, the Commission should forbear from regulating the SBC Companies as dominant in the market for high capacity dedicated transport services in the specified MSAs.

III. THE SBC COMPANIES DO NOT HAVE MARKET POWER IN THE MARKET FOR HIGH CAPACITY DEDICATED TRANSPORT SERVICES IN THE SPECIFIED MSAs

Attachment A to this petition is the report of a study conducted in the second quarter of 1998 by Quality Strategies, a market research firm. The study provides a high-level overview of the high capacity dedicated transport market and analyzes the state of competition for high capacity telecommunications services. Quality Strategies defines the high capacity dedicated transport market as the universe of DS1 and above circuits used either for end user customer traffic (e.g., circuits to provide either point-to-point or special access services) or for carrier transport (e.g., circuits to provide links between points-of-presence, central offices, and tandem switches). The high capacity dedicated transport market includes only facilities-based providers

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F.C.C.2d 554, 579-80 [¶¶ 37-38] (1983), vacated on different grounds, AT&T v. FCC, 978 F.2d 727 (D.C. Cir. 1992), cert. denied, 509 U.S. 913 (1993).

[31] AT&T Non-Dominant Order, 11 FCC Rcd at 3288 [¶ 27].

of high capacity dedicated transport circuits. It does not include resellers or carriers that provide their own transport.[32]

The demand for high capacity dedicated transport services is concentrated primarily in urban areas.[33] With competitive conditions sufficient to preclude suppliers from exercising market power in pricing these services in the largest metropolitan statistical areas in the SBC Companies' service territory, regulatory forbearance is warranted for these specific geographic areas. The SBC Companies lack market power in these areas because they lack the ability to raise and maintain prices above competitive levels without driving away so many customers as to make such an increase unprofitable.[34] This is because (1) the number and nature of competing suppliers in this market is large enough and strong enough to respond effectively to any price increase; (2) the SBC Companies' market shares have fallen significantly; (3) the price elasticity of demand for the SBC Companies' high capacity dedicated transport services means that customers are readily willing to change suppliers; (4) the supply elasticity of the overall market means that the SBC Companies' competitors stand ready and able to provide high capacity dedicated transport services should the SBC Companies' prices rise above competitive levels;

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[32] See Attachment A at 2-4.

[33] For example, about 97.7% of the SBC Companies' high capacity dedicated transport circuits are located in the 72 MSAs in SBC's region; 70% of the SBC Companies' high capacity dedicated transport circuits are located in the 14 MSAs for which relief from dominant carrier regulation is sought in this petition. See Attachment B.

[34] This is the definition of market power offered by Landes and Posner. See AT&T Non-Dominant Order, 11 FCC Rcd at 3275-76 [¶ 7].

and (5) when compared to their competitors, the SBC Companies gain no unfair competitive advantage from their cost structure, size, or resources.[35]

A. <u>Market Participants</u>

The competitive rivalry that currently exists in the SBC Companies' high capacity dedicated transport markets makes it impossible for the SBC Companies, or any other supplier, to wield market power. With at least one competitor in each of the 14 largest MSAs in the service territory of the SBC Companies and 10 different telecommunications suppliers owning and operating competitive networks in these cities, competitive entry has occurred in the high capacity dedicated transport markets, and significant costs have already been sunk to satisfy market demand.[36]

MCI WorldCom, through various mergers and acquisitions, is now a facilities-based provider of high capacity dedicated transport services in 13 of the 14 MSAs identified for regulatory relief in this petition.[37] AT&T (through its recent acquisition of TCG) now operates high capacity dedicated network facilities in seven of the MSAs.[38] Both MCI WorldCom and

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[35] <u>See</u> <u>id.</u> at 3274 [¶ 5], 3293 [¶ 38].

[36] <u>See</u> <u>generally</u> Attachment A. Customers for high capacity dedicated transport service in 9 of the 14 MSAs at issue in this petition have at least three suppliers <u>other than one of the SBC Companies</u> from which to choose.

[37] MCI WorldCom now owns the facilities once owned separately by Brooks Fiber, MFS, MCI, Wiltel, and WorldCom. Of the 14 MSAs at issue in this petition, the only one in which MCI WorldCom does <u>not</u> have facilities is El Paso, Texas. <u>See</u> Attachment A at 35-36.

[38] AT&T now owns facilities in Los Angeles, San Diego, San Francisco, San Jose, St. Louis, Dallas-Ft. Worth, and Houston. <u>See</u> Attachment A. The Quality Strategies study was conducted prior to the closing of AT&T's purchase of TCG; while the study makes reference only to TCG's facilities, this petition identifies these facilities as now belonging to AT&T.

AT&T not only have access to substantial amounts of investment capital further to expand and enhance their local networks, but they have strong incentives to compete with the SBC Companies for market share, particularly where MCI WorldCom and AT&T already have local networks in place. With substantial investments in local network facilities, MCI WorldCom and AT&T will likely seek to maximize efficiency gains from vertical integration. They can minimize their costs by providing high capacity dedicated transport services to their own local exchange networks.

The presence of numerous competitors' networks throughout the SBC Companies' largest high capacity dedicated transport market areas means that any attempt by the SBC Companies to increase the prices of their dedicated transport services will drive customers into the hands of their competitors. This is especially true now that MCI WorldCom and AT&T are present in virtually every market.

B. Market Share

The Commission has consistently recognized that "market share alone is not necessarily a reliable measure of competition, particularly in markets with high supply and demand elasticities."[39] The Commission has concluded that AT&T lacked market power despite its

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[39] Competition in the Interstate Interexchange Marketplace, Report and Order, 6 FCC Rcd 5880, 5890 [¶ 51] (1991) ("Interexchange Competition Order"); see also AT&T Non-Dominant Order, 11 FCC Rcd at 3307 [¶ 68] ("It is well-established that market share, by itself, is not the sole determining factor of whether a firm possesses market power."). In assessing the significance of market share data as an indicator of competition in telecommunications markets, the Commission has determined that market shares in the range of about 50% to 55% are "not incompatible with a highly competitive market" in the presence of relatively high supply and demand elasticities. Interexchange Competition Order, 6 FCC Rcd at 5889-90 [¶¶ 50-51].

finding that AT&T's market share in the relevant market was approximately 60%.[40] The Commission has also recognized that a declining market share may support the conclusion that a firm lacks market power.[41]

The Quality Strategies study attached to this petition has calculated market shares as of the second quarter 1998 by measuring a company's share of the total number of dedicated DS1 and above circuits that are provided over carrier-owned network facilities (i.e., excluding resale).[42] As a measure of the relative intensity of facilities-based competition, the SBC Companies' facilities-based competitors have captured more than half of the overall high capacity dedicated transport markets in both the San Francisco and Dallas-Ft. Worth MSAs and only slightly less than 50% of the Houston MSA market.[43] Competitors have captured about 45% of the high capacity dedicated transport markets in the Los Angeles, San Diego, and Austin markets.[44] The SBC Companies' facilities-based competitors are also supplying 30% to 40% of

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[40] AT&T Non-Dominant Order, 11 FCC Rcd at 3307 [¶ 68].

[41] Id. [¶ 67].

[42] Basing market shares on units of physical output, such as percentages of DS1 equivalent circuits, avoids the misinterpretations associated with relying on revenue data to measure market shares. Fluctuations in revenues can reflect individual carrier marketing decisions, decreasing the reliability of market share information as an indicator of market power. For example, special promotions and substantial, but temporary, price discounts are consistent with attempts to "buy market share" sometimes observed in competitive markets. Such marketing strategies can artificially (albeit temporarily) inflate rival firms' relative shares of total market revenues. See Comments of Southwestern Bell Telephone Company, Pacific Bell, and Nevada Bell at 13-16, CC Docket Nos. 96-262, 94-1 (filed Nov. 9, 1998) (discussing this point in detail).

[43] See Attachment A at 18-20, 32-34, 37-39.

[44] Id. at 9-12, 15-17, 29-31.

the high capacity dedicated transport circuits in the Little Rock, Sacramento, San Jose, Oklahoma City, and San Antonio markets.[45] Nearly 30% of the total high capacity dedicated transport in the St. Louis and El Paso markets is supplied by e.spire, AT&T, MCI WorldCom, and Intermedia Communications ("ICI").[46]

With competitive losses exceeding 25% in each of the 14 MSAs at issue here, the SBC Companies could not successfully increase their prices for high capacity dedicated transport service substantially above competitive levels and reap "monopoly profits." The Commission should forbear from regulating the SBC Companies as dominant carriers in these 14 MSAs, for the substantial competitive presence in each of these markets will ensure that prices remain at competitive levels.

C. Demand Elasticity

The price elasticity of demand for a particular carrier's services measures the responsiveness of customers to changes in the carrier's prices relative to the prices of substitute services. If demand is elastic, a carrier will quickly rescind any supracompetitive price increase to halt continuous revenue losses as demand shifts toward its rivals' lower-priced services. Relatively elastic demand for a carrier's services is therefore inconsistent with market power.

Since high capacity dedicated transport services are sold predominantly to telecommunications carriers and large corporate end users, total market demand for these

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[45] Id. at 6-8, 13-14, 21-22, 27-28, 40-43.

[46] Id. at 23-25, 35-36.

services is determined primarily by these two customer groups.[47] In addition, with the advent of personal computing, Local Area Network and Wide Area Network technology has spurred demand for high capacity networks that utilize DS1 and DS3 networks that tie "multi-location" business, city, and state municipalities, educational institutions, and some medium size retail businesses together. In its assessment of competition in the interstate, interexchange long distance market, the Commission concluded that large business customers "are to a large degree demand-elastic and will switch carriers in order to obtain price savings and desired features."[48] The Commission recognizes that large businesses are well-informed, sophisticated customers, routinely relying on the expertise of telecommunications managers and consultants in choosing among various carriers' services and prices.[49] There is no reason to expect large corporate end users to be any less informed or sophisticated in choosing among various carriers' high capacity dedicated transport services than they are in selecting retail long distance services.

Recognizing that large businesses typically prefer to divide their long distance traffic among several different carriers, the Commission has noted that large customers often "play one carrier off against another at the negotiating table."[50] Once again, this same strategy is as likely

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[47] See Attachment A at 4 ("Competitors cater to interexchange carriers and large business customers in particular vertical segments (particularly financial services, health care, and information transfer) commonly characterized as high-usage segments, in dense metropolitan areas.").

[48] Interexchange Competition Order, 6 FCC Rcd at 5887 [¶ 37].

[49] Id. [¶¶ 37-39].

[50] Id. [¶ 40].

to apply when businesses are obtaining high capacity dedicated transport services as it does when they are negotiating for long distance services. Furthermore, by dividing their traffic among various suppliers, large corporate end users develop relationships with a number of different carriers, thereby becoming "still more demand-elastic."[51]

Telecommunications carriers (and particularly IXCs) are responsible for a significant portion of the total demand for high capacity dedicated transport services. These companies have strong financial incentives both to minimize input costs and to maximize profits; they also have a comprehensive knowledge of the industry and relevant market areas. Carriers with the ability to "self supply" high capacity dedicated transport services will seek opportunities to shift demand away from the SBC Companies toward their own networks. Carriers have also traditionally shown no hesitation to use alternatives to the SBC Companies' high capacity dedicated transport services when a lower price is available elsewhere. Evidence from the major dedicated transport markets in the SBC Companies' service territory indicates that demand for the SBC Companies' services is price elastic, consistent with competitive market conditions.

D. Supply Elasticity

Supply elasticity measures the ability of carriers to respond to price increases by increasing the availability of telecommunications services. A relatively high market supply elasticity implies that carriers have sufficient capacity available (or can readily acquire additional capacity) to accommodate demand shifts away from any firm attempting unilaterally to increase

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[51] Id. at 5887-88 [¶ 40].

prices above competitive levels. High supply elasticities are therefore inconsistent with market power and typically are associated with competitive markets. If a carrier attempts to increase substantially its prices for high capacity dedicated transport services and if competitors have sufficient capacity "'to take away enough business . . . to make unilateral price increases . . . unprofitable,'" market power is absent.[52]

Throughout the MSAs identified in this petition, entrants have deployed their facilities in such a way as to maximize their ability to win the most lucrative customer accounts.[53] As Table 1 illustrates, with several hundred route miles of fiber optic cable deployed by competitors in many major high capacity dedicated transport markets, significant amounts of competitive capacity are available to discipline and constrain rival carriers' pricing behavior:

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[52] AT&T Non-Dominant Order, 11 FCC Rcd at 3303 [¶ 58] (quoting Interexchange Competition Order, 6 FCC Rcd at 5888 [¶ 45]).

[53] See Attachment C (maps of each of the 14 MSAs at issue in this petition, illustrating the extent of the regional networks of the SBC Companies' principal competitors); see also Attachment A at 4 (competitors "focus on small geographic areas when constructing fiber networks (particularly central business districts and business-intensive suburbs)").

TABLE 1[54]

MSA	Competitor Name as of 2Q98	Competitor Name as of 4Q98	Facility Type	Route Miles	Buildings on Network
Los Angeles	TCG	AT&T	Fiber	1000	200
Los Angeles	WorldCom	MCI WorldCom	Fiber	800	250
San Diego	Time Warner	Time Warner	Fiber	180	125+
San Diego	WorldCom	MCI WorldCom	Fiber	400	N/A
San Diego	TCG	AT&T	Fiber	400	200
San Francisco	TCG	AT&T	Fiber	450	N/A
San Francisco	WorldCom	MCI WorldCom	Fiber	226+	150+
St. Louis	TCG	AT&T	Fiber	300+	100-200
St. Louis	WorldCom	MCI WorldCom	Fiber	150+	N/A
DFW	WorldCom	MCI WorldCom	Fiber	700	250
DFW	TCG	AT&T	Fiber	500	N/A
Houston	TCG	AT&T	Fiber	600-800	N/A
Houston	WorldCom	MCI WorldCom	Fiber	200	N/A
Houston	Time Warner	Time Warner	Fiber	400	N/A

Of course, competitors are not limited by the reach of their own regional networks. Through collocation in the SBC Companies' central offices, competitors can provide high capacity dedicated transport services even to customers who are miles away from the competitors' existing regional networks.

Quality Strategies has also estimated that, consistent with high supply elasticities, a significant amount of unused network capacity is available in particular MSAs.[55] Available

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[54] The data for this table comes from the Quality Strategies Study, see Attachment A.

[55] For example, as of the second quarter of 1998, an estimated 50% of AT&T's regional network capacity was available in the St. Louis market area, while 40% was available in its Dallas-Ft. Worth market area network capacity was available. Id. at 24, 33. Similarly, Quality Strategies estimated that 70% of MCI WorldCom's regional network capacity could have accommodated new demands for service in San Francisco (id. at 19), while an estimated 85% of its regional network was available in San Jose (id. at 22).

capacity on competitors' networks appears more than sufficient to thwart any attempts by carriers unilaterally to increase their prices substantially above competitive levels.

E. Cost Structure, Size, and Resources

The cost structure, size, and resources of the SBC Companies confer on them no unfair advantage, as reflected by the success that facilities-based competitors in the high capacity dedicated transport services market have had in the largest urban areas in the SBC Companies' territories. To the extent competition rewards efficiency, those suppliers operating more efficiently (i.e., with lower overall cost structures) will be more successful than their less efficient rivals. Similarly, to the extent that SBC Companies' customers benefit from economies of scale and scope, these production efficiencies are not the result of "unfair" competitive advantages.

Furthermore, the IXCs' vertical integration strategies may provide marketing opportunities that are currently unavailable to the SBC Companies. For example, high capacity dedicated transport services might be combined with retail long distance services to create variations of contracts, service packages, and special promotions that the SBC Companies are precluded from offering.

Moreover, the SBC Companies' facilities-based competitors are not small, start-up firms operating within modest budgets. The financial resources available for network investment and marketing campaigns to such major corporations as MCI WorldCom, AT&T, Time Warner, and Cox Communications are certainly no less than the financial resources available to the SBC Companies for these purposes. Large corporations like AT&T and MCI WorldCom have longstanding contractual relationships with major suppliers of telecommunications equipment that include price discounts and other features. Finally, AT&T, MCI WorldCom, and Time Warner are well known to the large corporate end users and telecommunications carriers that use high capacity dedicated transport services. There are simply no aspects of the SBC Companies' cost structure, size, or resources that can be regarded as constituting an "unfair" advantage when compared to the cost structure, size, and resources of their competitors.

IV. THE COMMISSION SHOULD FORBEAR FROM REGULATING THE SBC COMPANIES AS DOMINANT CARRIERS IN THE MARKET FOR HIGH CAPACITY DEDICATED TRANSPORT SERVICES IN SPECIFIED MSAs

A. Requested Regulatory Relief

Instead of the onerous regulatory requirements currently applicable, the SBC Companies should be allowed to carry out their business in the high capacity dedicated transport services market in each of the 14 MSAs under the same rules and with the same flexibilities that their competitors enjoy. To the extent that Part 61 tariffing rules and Part 69 access charge rules apply only to the SBC Companies and not to their competitors in the high capacity dedicated transport services markets described in this petition, the Commission should forbear from enforcing them.[56]

[56] On behalf of the SBC Companies, SBC is requesting that the Commission forbear from enforcing, in each of the 14 MSAs identified in this petition, any access charge rules that apply solely to the incumbent SBC Companies and not to their competitors.

The SBC Companies should be free to file tariffs for their high capacity dedicated transport services on one day's notice, and the tariffs should be presumed lawful.[57] As the Commission explained in its Nondominant Tariff Order, "the current notice period imposes direct and indirect costs on consumers by delaying the availability of new services and price reductions, and by distorting the competitive marketplace in general."[58]

The SBC Companies should be free to set prices that reflect market conditions in a particular geographical area. For example, in a densely populated downtown metropolitan area with a high concentration of business and a preexisting "hi-tech" infrastructure, the actual cost of providing high capacity dedicated transport services is much lower than providing the same services in a suburban or rural area.

The SBC Companies should be free to make pricing decisions that reflect different terms and conditions for specific customer needs and applications. This includes having the flexibility to offer volume and term discounts, as well as promotional pricing options. The SBC Companies sell high capacity dedicated transport services to high-volume IXCs and business customers that are frequently offered proposals for similar services from numerous unregulated vendors. These customers have considerable negotiating power given the amount of competition within certain MSAs.

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[57] This is the same relief that the Commission granted to AT&T, see AT&T Non-Dominant Order, 11 FCC Rcd at 3281 [¶ 12].

[58] Tariff Filing Requirements for Nondominant Common Carriers, Memorandum Opinion and Order, 8 FCC Rcd 6752, 6756 [¶ 22] (1993), vacated, Southwestern Bell Corp. v. FCC, 43 F.3d 1515 (D.C. Cir.), reinstated in relevant part, Order, 10 FCC Rcd 13653 (1995).

The SBC Companies are at a significant competitive disadvantage when selling to IXC customers. There are several recent examples that illustrate the difficulties caused by the one-sided regulation of high capacity dedicated transport services:

1. In May 1997, AT&T submitted a Request for Proposal ("RFP") for 164 DS3 circuits and 142 multiplexers in Dallas, Texas. Southwestern Bell responded to the RFP with a three-year, custom network proposal at a rate that was considered competitively priced given the other competitors' published rates in the Dallas MSA. Months later, the Commission denied a tariff filing for this custom network. Consequently, about 130 of the 164 DS3 circuits were awarded by AT&T to MFS, because Southwestern Bell was prevented from responding with rates other than those contained in its existing tariff.

2. Coastal Telephone Company submitted an RFP in February 1997 for 25 DS3 circuits to be placed under a five-year contract in Houston. The incumbent CAPs were MFS and TCG. In May, Southwestern Bell submitted to the Commission a proposed tariff that offered a competitive response to the RFP. The Commission rejected the tariff in November; MFS and TCG retained the customer account simply because existing regulatory mechanisms constrained Southwestern Bell's ability to compete effectively for this business.

3. The SBC Companies' AT&T account team was informed by AT&T that other DS3 circuits would be considered for competitive bids. Table 2 lists AT&T's Texas locations that either have been lost to the SBC Companies' competitors or are at risk unless some regulatory relief is provided:

TABLE 2

AT&T	# of DS3s	Lost = Circuits Already Lost to Competitor Planned = Circuits that AT&T Plans to Award to Competitor	SBC'S Competitor for the DS3 Business
Amarillo	7	Lost	e.spire
El Paso	17	Planned	e.spire
Austin	40	Lost	Time Warner
Dallas	70	Lost	MCI WorldCom & AT&T
Ft. Worth	60	Lost	e.spire
Beaumont	10	Planned	Time Warner
Corpus Christi	14	Planned	AT&T
San Antonio	55	Planned	Time Warner
Longview	13	Planned	AT&T
Total:	286		

4. In California, Pacific Bell continues to lose business due to its inability to respond to customers with contract-based pricing. In the Federal Government market segment, Pacific Bell has lost about 20 DS1 projects under five-year contracts to competitors that were able to negotiate a contract price.[59]

5. Customers such as TU Electric, General Electric, WalMart, Lucent Technologies, and MCI WorldCom have requested the SBC Companies to discount DS1 and DS3 services based on overall demand within a LATA or a State. In some cases, they have requested these discounts to span across DS1 and DS3 services, which involve crossing various sections of Commission tariffs. For the SBC Companies to prepare tariffs that respond to such requests for restructured

[59] The Federal Government will not agree to termination liability clauses associated with term pricing for any dedicated transport services. Were SBC granted the ability to negotiate contract-based pricing, it could compete with others that have the flexibility to waive termination liability in certain instances.

volume discount plans and associated term prices requires too much time. If the SBC Companies were permitted instead to deliver volume and term pricing plans that respond to a customer's specific needs, it would increase competition in the market for DS1 and DS3 services and likely lower prices for these services for the general public.

Competitors are permitted to offer limited time promotions such as free installation charges with a DS1 circuit if ordered under a three-year term pricing plan. As with contract-based pricing and volume/term pricing, timing is a critical factor in successful marketing of promotional pricing. Given the time required to prepare tariffs and respond to competitor promotional offers for DS1 and DS3 services, a "promotional tariff" is nonsensical. The SBC Companies remain at a competitive disadvantage without the flexibility to offer promotional pricing for its high capacity dedicated transport services.

B. <u>Forbearance from Dominant-Carrier Regulation is Warranted</u>

As discussed above, the SBC Companies do not possess market power in the high capacity dedicated transport services market in any of the 14 MSAs identified and discussed in the Quality Strategies study attached to this petition. For this reason, the Commission should forbear from applying any regulations to the SBC Companies that they do not also apply to their competitors. The SBC Companies have demonstrated that they satisfy the three criteria set forth in section 10, 47 U.S.C. § 160, entitling them to forbearance:

1. <u>Continued regulatory requirements for the SBC Companies' high capacity dedicated transport services in the specified market areas are not necessary to ensure that rates and practices are just, reasonable, and not unjustly or unreasonably discriminatory</u>. Competitive

market forces, rather than regulation, will ensure just, reasonable, and nondiscriminatory prices and business practices. Sophisticated IXCs and business end users – the two customer groups that demand high capacity dedicated transport services – will turn to alternative suppliers if ever they perceive the SBC Companies' prices or business practices to be inappropriate. IXCs already have an incentive to use their own affiliates' networks, so any attempt by the SBC Companies to raise prices or to engage in discriminatory practices will be thwarted. Moreover, the Commission's complaint procedures will remain available for challenging any rates that are unjust, unreasonable, or discminatory.

2. Continued regulatory requirements for high capacity dedicated transport services in the identified MSAs are not necessary to protect consumers. The Commission has acknowledged that regulatory oversight should diminish as competition increases: "When robust competition is widespread we should do everything possible to eliminate anomalies or asymmetries between the rules applicable to incumbents and the rules applicable to new entrants."[60] Competition in the provision of dedicated transport services in the largest MSAs in the SBC Companies' service territory is extensive, and these conditions do not support the continued application of such asymmetric rules to protect the major corporations and telecommunications carriers purchasing these services. Rather than protecting consumers, unnecessarily restrictive regulation can deny consumers the full benefits of competition. The Commission has recognized that

[60] Southwestern Bell Telephone Company Tariff F.C.C. No. 73, Order Concluding Investigation and Denying Application for Review, 12 FCC Rcd 19311, 19337 [¶ 52] (1997).

> in a competitive setting, we generally would agree that regulation of new entrants and incumbent LECs should be symmetrical, and recognize that allowing SWBT to respond to written bid requests in markets where entrants have sufficiently established themselves would result in lower prices, and present SWBT little opportunity to take actions that may lessen competition.[61]

The SBC Companies can neither sustain "monopoly" prices for their high capacity dedicated transport services nor otherwise damage the competitive process in these markets. Continued regulatory requirements for the SBC Companies' provision of these services are simply not necessary to protect consumers.

The SBC Companies are also quite clearly incapable of precluding entry into the high capacity dedicated transport markets, as evidenced by the number of competitors already competing throughout its region.[62] The SBC Companies' high capacity dedicated transport customers are well aware of competitive alternatives and have demonstrated a willingness to purchase their services. Moreover, the SBC Companies' facilities-based competitors have sufficient capacity (and can quickly expand their capacity, if necessary) to accommodate demand shifts away from the SBC Companies' services. With competitive conditions sufficient to constrain any carrier's ability substantially to increase its prices, continued application of regulatory restrictions on the SBC Companies' pricing decisions in these markets is not necessary to protect consumers.

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[61] Id. [¶ 53].

[62] See Attachment A at 4 (indicating that "[m]any of these competitors are seasoned, well-financed telecommunications companies").

Regulatory forbearance for the SBC Companies in the provision of high capacity dedicated transport services in major metropolitan areas will not expose consumers to substantially higher telecommunications service prices. The presence of a number of financially viable facilities-based competitors, competitive market supply and demand conditions, and competitors' rights to seek regulatory and/or judicial solutions to alleged anticompetitive pricing strategies all serve to safeguard consumer interests at least as effectively as restricting a single carrier's ability to change its prices.

Finally, consumers of the SBC Companies' services in less competitive markets have nothing to fear from forbearance. This petition is limited to the specific market for high capacity dedicated transport services in the 14 identified MSAs. In other markets, price-cap regulation would remain in place, so the SBC Companies will not be able to overcharge consumers in these less competitive markets as a means of subsidizing lower prices in the competitive high capacity dedicated transport markets.

3. Forbearance from applying continued regulatory requirements to high capacity dedicated transport services in the identified MSAs is consistent with the public interest. One of the primary benefits of competition is that customers pay the lowest possible prices. Prices in fully competitive markets decline to levels consistent with the underlying cost structures of the most efficient producers. But if one supplier (or a particular group of suppliers) is prevented from participating in the competitive process – especially if the excluded firm is one of the more efficient service producers – then there is no guarantee that prices will decline as they should. Continuing to prohibit the SBC Companies from responding flexibly to competitive price

changes and/or shifts in market demand reduces the likelihood that truly competitive prices will prevail in the high capacity dedicated transport markets.

Competitors not subject to strict regulatory requirements can tailor prices to attract the more profitable accounts. Competitors can maintain prices at a fixed discount below the SBC Companies' tariffed rates, quickly changing these prices just prior to the effective date of any rate changes produced (slowly and publicly) through the regulatory process. The SBC Companies' unregulated competitors can target certain accounts by offering volume discounts, contract pricing, or other customer-specific price arrangements that the SBC Companies are currently prevented from matching. Furthermore, competitors know that the SBC Companies simply cannot offer meaningful promotional prices or discounts. Finally, competitors have little incentive to respond to customer RFPs with their lowest bids since a major competitor is effectively precluded by regulation from participating at all.

Forbearance will accelerate the competitive process in high capacity dedicated transport markets. If the SBC Companies were able to exercise the same pricing flexibility as their competitors, market prices will quickly move toward levels consistent with the costs of the most efficient producers, with customers of high capacity dedicated transport services benefiting from declining prices. To the extent that the retail long distance market is vigorously competitive, declining high capacity dedicated transport prices should lead directly to lower long distance prices.

Forbearance will further intensify competition in the high capacity dedicated transport markets by relaxing some of the restrictions imposed on the SBC Companies' efforts to compete against the major IXCs. Particularly in light of their recent CAP acquisitions, the major IXCs will offer packages to their high-volume customers that include both dedicated transport and retail long distance services. Although the SBC Companies are presently unable to challenge the various pricing plans associated with such service bundles, the pricing flexibility resulting from forbearance will at least provide the SBC Companies with the opportunity to compete for the dedicated transport portion of any IXC service packages. As access markets continue to evolve, end users should not be denied the possibility that combining the SBC Companies' dedicated transport services with IXC long distance offerings might produce lower overall telecommunications bills.

V. CONCLUSION

For the foregoing reasons, SBC respectfully requests that the Commission exercise its authority to forbear from regulating the SBC Companies as dominant carriers with respect to high capacity dedicated transport services in the 14 MSAs identified in this petition and to forbear from enforcing any Commission rules affecting high capacity dedicated transport services that apply to the SBC Companies but not to their competitors.

Respectfully submitted,

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